In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 63

UNITED STATES OF AMERICA, PETITIONER

v.

W. M. WEBB, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

1. Respondents assert (Resp. Br. 21) that "The fishermen, under the decisions below, obviously qualify as self-employed persons under SECA [the Self-Employment Contributions Act of 1954, Section 1401 *et seq.* of the Internal Revenue Code]." Neither the district court nor the court of appeals addressed itself to this question, and there is no theory under which the crewmen (as opposed to the captains) could be considered independent contractors for SECA purposes—they are no more entrepreneurs than are sales clerks in a department store.

The problem of administration under the social security laws to which we referred in our petition

(Pet. 15–16) thus cannot be dismissed as simply one of shifting a tax burden (Resp. Br. 21–22, 44). Respondents view the question of the crewmen's status under the SECA as one to be resolved separately by a jury in each case. It is obvious, however, that such a system would not work, and cannot have been contemplated by Congress. The only practical way to handle this situation is the way the parties did handle it. The only ones who took in money were the owners. They paid the captains and the crews. They withheld federal income tax and paid it to the government. They withheld F.I.C.A. tax and paid it to the government. It is unrealistic to say that this should have been done by the captains. It is fanciful to say that the crewmen should have made their own payments and treated themselves as self-employed. It is unwarranted to say that the statute should be construed to say that Congress intended these questions to be passed upon by a jury or other fact finder in each case, long after the event, with no one knowing in the meantime what his responsibilities were or where he stood.[1]

On the contrary, here it is obvious that all parties at all times regarded the owners as the financially responsible parties. They owned the boats; they kept them in repair; they provided the fuel; they took out insur-

[1] That the ultimate question presented here is one of mixed fact and law does not prevent review on appeal which would insure uniform treatment of all fishermen. As the Fifth Circuit recently observed, "Obeisance to the clearly erroneous rule must yield when the facts are undisputed and we are called upon to reason and interpret." *United States* v. *Winthrop*, 69–2 CCH Tax Cases, par. 9686, pp. 85,884, 85,887.

ance; they bore the risk of loss; they set the pay scales;[2] they paid the bills; they paid the captains and the crews; they withheld income tax and paid Social Security tax. They were in charge. The parties understood and accepted that, and that should be enough to dispose of this case.

2. Congress' unexplained failure (Pet. 16, n. 5) to adopt the Treasury's 1967 proposal, which would have expressly included captains and crewmen of commercial fishing vessels in the definition of "employee" in Section 3121(d) of the Code, does not aid respondents, as alleged (Resp. Br. 44–46). Under that proposal, the captains and crewmen would have been treated as employees "* * * irrespective of the common law status of these persons." S. Rep. No. 744, 90th Cong., 1st Sess., p. 320. But our position here is not that "these persons" be treated as employees even though they do not qualify as such under the traditional test, but rather that their common law status is that of employees. Furthermore, the deletion of the Treasury proposal in the Conference Committee cannot be interpreted as resolving the problem presented in the instant case, since it followed both the decision of the district court below and the earlier holdings to the contrary of the Court of Claims and the First Circuit in *Cape Shore Fish Co.* v. *United States,* 330 F. 2d 961; *Kirkconnell* v. *United States,* 347 F. 2d 260; and *Capital Trawlers, Inc.* v. *United States,* 324 F. 2d

[2] "Prior to commencement of a new season, the taxpayers would furnish the captain with the pay scale of crew members and the crew size to be employed for the season. If a bonus was to be paid for fishing the entire season, this information also was furnished the captains." (R. 323, Finding 22.)

506, affirming *per curiam*, 216 F. Supp. 440 (D. Me.). As we noted in our petition (Pet. 16, n. 5), Congress' failure to act thus may as logically be interpreted as approving the decisions of the Court of Claims and the First Circuit as expressing a conclusion to the contrary. Or, the conferees for the Senate may have yielded on this amendment in the belief that it was not necessary, and with the thought that they could thus readily use it in exchange for some concession on another matter by the conferees for the House.[3]

The most that is shown is that Congress, for whatever reasons, concluded not to change the situation as it then stood. This does not show that the captains and crews were not employees of the owners under the law as it had been enacted in 1948. In any event, legislation enacted in 1967 would not have affected this case which involves the years 1956 and 1957, long before this abortive consideration of the question by Congress.

3. That respondents themselves thought that the captains and crewmen were employees rather than independent contractors is evidenced by the payroll records that were maintained for these individuals. Samples of these records were introduced into evi-

[3] Cf. *United States* v. *Price*, 361 U.S. 304, 310–311, 312: "Such nonaction by Congress affords the most dubious foundation for drawing positive inferences. * * * Whether Congress thought the proposal unwise, as respondent argues, or unnecessary, we cannot tell; accordingly, no inference can properly be drawn from the failure of Congress to act."

See also *United States* v. *Wise*, 370 U.S. 405, 411.

dence in connection with the testimony of Jack T. Styron (R. 68–146). Defendant's Exhibit 1, Appendix, *infra*, pp. 7–8, is the type of summary sheet used in the preparation of respondents' bi-weekly payrolls (R. 129). Defendant's Exhibit 2, Appendix, *infra*, pp. 9–10, is a sample "individual pay roll record" (R. 297, 298) of a crew member, which was prepared from the basic data shown in the bi-weekly summary sheets (R. 129).

Records such as these show clearly enough that the owners were the entrepreneurs here. They were the managers; they handled the money, all of it. They paid the bills; they filed the tax returns. Moreover, they were the ones who were in the position to do this; and it was expected of them by all concerned.

Such records and payments are not necessary when a taxpayer retains the services of an independent contractor. There is no need to have a "payroll" for self-employed persons or to withhold federal income taxes from payments made to such persons. See Section 3401 *et seq.* of the Internal Revenue Code. Nor is there a need to obtain from an independent contractor a W–4 form showing the number of exemptions claimed by the individual for withholding tax purposes. See Section 3402(f)(2). Respondents nevertheless maintained these detailed payroll records, withheld federal income taxes and insisted that the captains and crew furnish properly completed W–4 forms each year (R. 188,

225–226, 250),[4] as required by law in the case of employees. See Section 3402(f)(2). In short, respondents treated the captains and crewmen as employees and not as independent contractors.

CONCLUSION

For the foregoing reasons, and for those expressed in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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NOVEMBER 1969.

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[4] Deposition (R. 250) of Larney Arling Johnson (question by Mr. Waters, counsel for the government):

"Q. Before the season started, did you have all your crew members fill out the withholding statements and social security tax forms, etc.?

A. Yes sir, I had orders that those men would have to fill that out before they received their first pay check.

Q. Otherwise, they couldn't get paid the first time until they turned in that information?

A. That's right."

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APPENDIX

Defendant's Exhibit 1

8-24-66

PAUL W. WILLIAMS

[Reporter]

Plaintiff

Name	Check No.	Hours	Week of Hours	Rate	Payment	Fed. Tax	St. Tax	Fund	Attorney	Other	Balance	
Sylvester Willis	2644	44	14.22	3.0	158	99	1.89	13.17	2.06	115.00		2.58	00
Deacious Snipes	65	8	11.92	3.0	269	36	5.39	33.76	2.05		6.00	243	96
James Bridgeman	66	7	11.92	3.0	2.27	26	4.86	8.20	2.05		1.79	191	66
James Collins	67	8	11.92	3.0	253	50	5.07	32.46	2.05		5.00	190	28
Alonzo Bell	68	4	15.92	3.0	181	90	3.64	11.30	2.05		5.00	137	91
Curtis Owens	69	6	11.92	3.0	167	50	3.35	3.20	2.05		30.26	120	72
Edward Gilbert	70	10	11.92	3.0	167	50	3.35	—	2.05		5.00	138	18
Eddie Osborne	71	4	14.22	3.0	158	90	2.78	6.80	2.05		31.00	100	71
Matthew Anderson	72	3	14.22	3.0	137	90	2.78	11.00	2.05		5.00	99	11
Howard Ford	73	2	14.22	3.0	138	90	2.78	15.60	2.05		5.00	94	61
George Tompkins	74	6	11.92	3.0	167	50	3.43	—	2.05		13.00	114	18
Earl Guillory	75	1	11.92	3.0	138	90	2.78	20.20	2.05		6.00	89	91
Thomas Watson	76	5	15.38	3.0	138	90	2.78	1.80	2.05		10.00	103	31
Samuel Tuttle	77	2	14.22	3.5	131	70	2.64	9.60	2.05		5.00	93	49
Henry Thomas	78	5	15.38	3.5	131	70	2.64	.30	2.05		5.00	102	79
Willie Mack	79	6	11.92	3.5	131	70	2.64	—	2.05		5.00	103	09
Isaac Davis	80	2	14.22	3.5	131	70	2.64	18.20	2.05		5.00	88	89
Willie Wilson	81	2	1001	3.5	94	50	1.82	7.10	10.50			71	42
James Lair	82	2	12.09	3.5	110	60	2.21	10.70	2.05		20.00	56	64
Willie Batson	83	6	11.92	3.5	131	70	2.64	—	2.05		5.00	103	09
Joseph Weston	2684	2	14.22	3.5	131	70	2.64	11.20	2.05		5.00	88	87
TOTALS					3597	17	0304	24403	4214	115.00	139.05	2545	74

Defendant's Exhibit 1—Continued

Sheet #2

UNIT: Sea Raider PERIOD: 1432 NOS 289.5 Bi-weekly ENDING May 25 19 67

PAYROLL $ 4145.64 DISTRIBUTION

NAME	Check No.	Class	Fish or Hours	Rate	Payment		S.S. Tax	W. Tax	Food	Advance	Other	Balance	
					2557	17	63.04	264.93	43.44	115.00	139.05	2545	74
Charles Dumas		4	822	9.5	73	83	1.48	--	10.50	16.09	45.76	—	—
Joe Waters	2685	5	1119	9.5	102	15	2.04	--	18.00		5.00	77	01
Eunice Davis	86	2	1432	9.5	131	78	2.64	14.20	21.05		45.20	48	69
Louis Andrews	87	2	1192	9.5	109	98	2.18	10.40	19.50		5.00	71	90
Charles LeBlanc	88	3	1192	9.5	108	78	2.18	5.80	11.05		31.00	48	95
Joe Taylor	2689	3	357	.17	60	69	1.22	--	6.00			53	47
TOTALS-					4145	48	74.78	295.33	527.51	131.09	271.01	2845	76
Cooperative Market (Food)	2690											527	61
Lafayette Facility	2691											192	76
George Lyon Market	2692											25	40
Cecil's Bank	2693											51	00
Cameron Drug Store	2694											1	79
TOTALS													

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SUPREME COURT OF THE UNITED STATES

No. 63.—OCTOBER TERM, 1969

United States, Petitioner, v. W. M. Webb, Inc., et al. } On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[March 3, 1970]

MR. JUSTICE HARLAN delivered the opinion of the Court.

The respondents in these consolidated cases own boats that are used in commercial fishing in the Atlantic Ocean and the Gulf of Mexico. Their fishing is carried out through contractual arrangements, shaped by established custom, with boat captains, who man the boats and manage their day-to-day operation. The question before the Court is whether the captains and crewmen of the boats are the "employees" of the respondents within the provisions of the Federal Insurance Contributions Act (FICA)[1] and the Federal Unemployment Tax Act (FUTA),[2] which impose taxes on employers to finance government benefits for employees.

I

During the taxable periods involved here,[3] the respondents' vessels were engaged in fishing for menhaden, a nonedible fish that is processed and used for various

[1] 26 U. S. C. § 3100 *et seq.*

[2] 26 U. S. C. § 3300 *et seq.*

[3] The District Court found that the periods were, for different respondents, January 1, 1956, through December 31, 1956, and July 1, 1957, through December 1, 1958.

industrial purposes. The owner of each vessel equipped the vessel and secured the services of an experienced fisherman to be captain. The captain then assembled a crew. The captain customarily served on the same vessel for a full season, and occasionally for several consecutive seasons, although the oral arrangements between owners and captains permitted either to terminate the relationship at the end of any fishing trip. The fishing trips lasted from one to several days.

The vessels were operated from docking facilities owned by fish processing plants, and discharged their catch at these plants upon the completion of each trip. The plants paid respondents for the fish according to the volume of the catch, and respondents paid the captains and crews on the same basis, following terms that had been negotiated in advance. Neither captains nor crews were guaranteed any earnings if they failed to catch fish. While respondents determined the plant to which the vessels would report and generally where and when the fishing would take place, the captains managed the details of the operation of the boats and the manner of fishing.

Respondents filed tax returns as employers under the FICA and the FUTA, and paid the employer's share of the taxes due on the earnings of the captains and crews. After making the appropriate claims for refunds, they sued for refunds in the District Court for the Eastern District of Louisiana. The District Court, sitting without a jury, determined after trial that the captains and crews were not respondents' employees for the purposes of these tax statutes. The trial court noted that both the FICA and the FUTA define "employee" as any individual who has employee status under "the usual common law rules" applicable to a determination of the master-servant relationship. It found "without merit"

the Government's contention "that the common law governing the relationship of the taxpayer and the fishermen in pursuing fishing ventures in the Gulf of Mexico and the Atlantic Ocean is the general maritime law." 271 F. Supp. 249, 257 (1967). The court found further that the degree of control exercised by respondents over these fishing activities was not sufficient, under the common-law standards governing land-based occupations, to create the relationship of employer and employee between respondents and the captains and crews. Respondents were thus entitled to their refunds.

On appeal, the Court of Appeals for the Fifth Circuit affirmed. It reviewed the facts and observed that "it is clear that under maritime law the captain is the agent of the owner . . . and the crew hands are employees," and that "[i]f we were free to apply maritime law as a test of the employer-employee relationship, we would reverse the decision of the district court." 402 F. 2d 956, 959 (1968).[4] However, the Court of Appeals agreed with the District Court that the statutes' prescription of "common law rules" barred application of maritime standards.

This conclusion conflicts with the approach of the Court of Claims in *Cape Shore Fish Co.* v. *United States*, 330 F. 2d 961 (1964). In that decision, the court found scallop fishermen, operating under arrangements similar to those here, to be employees of the shipowner for the purposes of these statutes. It reached this conclusion by applying to the facts the standards of maritime law. We granted certiorari in this case, 394 U. S. 996 (1969), to resolve this conflict, and to clarify the application to maritime workers of these important federal statutes.

[4] We are not called upon to, and do not, intimate any view on the correctness of the Court of Appeals' statement on this score.

II

The parties agree that both the FICA and the FUTA impose taxes on employers measured by the compensation paid to employees, and that in terms of these cases the two statutes define "employee" identically. In the FICA "employee" is defined to include "any individual, who under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee," and the language of the FUTA is to the same effect.[5] These definitions were not included in the original Social Security Act as it was adopted in 1935, which defined "employee" merely by specifying that it "includes an officer of a corporation," [6] but were added by amendment in 1948. We must consider the events that prompted the amendment.

In 1935 the draftsmen of the Social Security Act apparently thought it unnecessary to elucidate the meaning

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[5] The definitions provide:

"For the purposes of [the FICA], the term 'employee' means—(1) any officer of a corporation; or (2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee; or (3) [any member of several specific occupations, not including fishing, when certain conditions are satisfied]." 26 U. S. C. § 3121 (d).

"For purposes of [the FUTA], the term 'employee' includes an officer of a corporation, but such term does not include—(1) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an independent contractor, or (2) any individual (except an officer of a corporation) who is not an employee under such common law rules." 26 U. S. C. § 3306 (i).

[6] Social Security Act § 1101 (a)(6), 49 Stat. 620, 647. The language of § 1101 (a)(6) was carried over to §§ 1426 (c) and 1607 (h) of the Internal Revenue Code of 1939, the predecessors of present §§ 3121 (d) and 3306 (i) of Title 26, respectively. See 53 Stat. 1, 178, 188.

of "employee" because they assumed that the term, as it was applied to varying factual situations, would be given the "usual" meaning it bore at common law. See S. Rep. No. 1255, 80th Cong., 2d Sess., 3–4 (1948). However, over the years of applying the Act to a myriad of work relationships, the lower federal courts developed somewhat varying approaches, certain courts relying more heavily on common-law precedents and others attempting to discern a special meaning for the term from the purposes of the legislation.[7] In addition, the courts tended to look to local precedents to determine the common-law standards, producing different results for similar factual situations in various parts of the country.[8] This divergence of views led this Court, in 1947, to render two decisions in an attempt to clarify the governing standards. *United States* v. *Silk*, 331 U. S. 704 (1947); *Bartels* v. *Birmingham*, 332 U. S. 126 (1947).

In *Silk*, the Court upheld the lower courts' determination that certain truck drivers were, under the circumstances, independent contractors rather than employees, but it upset a similar ruling with respect to a group of men who unloaded coal from railroad cars. In *Bartels* the Court, reversing the Court of Appeals, held that the members of certain dance bands were not employees of

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[7] Compare, *e. g.*, *Jones* v. *Goodson*, 121 F. 2d 176 (C. A. 10th Cir. 1941); *Radio City Music Hall Corp.* v. *United States*, 135 F. 2d 715 (C. A. 2d Cir. 1943); *United States* v. *Mutual Trucking Co.*, 141 F. 2d 655 (C. A. 6th Cir. 1944); *McGowan* v. *Lazeroff*, 148 F. 2d 512 (C. A. 2d Cir. 1945); *United States* v. *Wholesale Oil Co.*, 154 F. 2d 745 (C. A. 10th Cir. 1946), with *United States* v. *Vogue*, 145 F. 2d 609 (C. A. 4th Cir. 1944); *United States* v. *Aberdeen Aerie*, 148 F. 2d 655 (C. A. 9th Cir. 1945); *Grace* v. *Magruder*, 148 F. 2d 679 (C. A. D. C. Cir. 1945).

[8] See S. Rep. No. 1255, *supra*, at 6.

the owners of the dance halls at which they were engaged, despite contractual provisions characterizing them as employees. While the Court's opinions in these cases stressed many of the factors that had been important in common-law determinations of employee status, they also contained language that could be read to detach the question of statutory coverage from the common-law tests.[9] The Court stated, in *Bartels*, that "in the application of social legislation employees are those who as a matter of economic reality are dependent upon the business to which they render service." 332 U. S., at 130.

Acting upon this language, the executive agencies set about replacing their original regulation, which had defined the employment relation in terms of the incidents

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[9] In *Silk*, the Court said:

"As the federal social security legislation is an attack on recognized evils in our national economy, a constricted interpretation of the phrasing by the courts would not comport with its purpose. . . .

". . . When [the problem of differentiating between employee and independent contractor] arose in the administration of the National Labor Relations Act, we pointed out that the legal standards to fix responsibility for acts of servants, employees or agents had not been reduced to such certainty that it could be said there was 'some simple, uniform and easily applicable test.' The word 'employee,' we said, was not there used as a word of art, and its content in its context was a federal problem to be construed 'in the light of the mischief to be corrected and the end to be attained.' We concluded that, since that end was the elimination of labor disputes and industrial strife, 'employees' included workers who were such as a matter of economic reality. . . . We rejected the test of the 'technical concepts pertinent to an employer's legal responsibility to third persons for acts of his servants.' . . . *Labor Board* v. *Hearst Publications*, 322 U. S. 111, 120, 123, 124, 128, 129, 131.

"Application of the social security legislation should follow the same rule that we applied to the National Labor Relations Act in the *Hearst* case." 331 U. S., at 713–714.

of employment at common law,[10] with a new regulation that would embody the test of "economic reality." [11] However, the proposed new regulation never took effect. Within two months of its announcement, a resolution was introduced in both the House of Representatives and the Senate calling for "a reassertion of congressional intent regarding the application of the Act." S. Rep. No. 1255, *supra*, at 7. This resolution, which was finally passed over the President's veto, added to the statutes the present definitions of "employee." [12]

The report of the Senate Finance Committee on the resolution makes clear a congressional purpose to disapprove the proposed regulation and to reaffirm that determinations of employee status were to be based on the traditional legal tests. The Committee seems to have thought that the *Silk* and *Bartels* decisions had applied traditional common-law standards, despite the language in the opinions suggesting a less constrictive approach. However, noting that the Treasury Department claimed support in those decisions for its contemplated new departure, the Committee declared: "But if

[10] 1 Fed. Reg., Pt. 1, at 1764 (1936), promulgated November 9, 1936 (Treasury Department); 1 Fed. Reg., Pt. 1, at 1276 (1937), promulgated July 21, 1937 (Social Security Board).

[11] 12 Fed. Reg. 7966 (1947).

[12] H. J. Res. 296, Pub. L. No. 642, c. 468, 62 Stat. 438; see H. R. Doc. No. 711, 80th Cong., 2d Sess. (veto message of President Truman). This 1948 amendment put the definitions in both statutes in the negative form now found in 26 U. S. C. § 3306 (i), see n. 5, *supra*. The Social Security Act Amendments of 1950 restyled the predecessor of § 3121 (d), giving it the form now possessed by that provision, without changing the applicable principles except to extend coverage to specified classes of workers irrespective of their common-law status. C. 809, § 205, 64 Stat. 477, 536; see H. R. Rep. No. 2771, 81st Cong., 2d Sess., 104 (1950); cf. S. Rep. No. 1669, 81st Cong., 2d Sess., 17–18 (1950); H. R. Rep. No. 1300, 81st Cong., 1st Sess., 80–91, 189–207 (1949).

it be contended that the Supreme Court has invented new law for determining an 'employee' under the social-security system in those cases, then the purpose of this resolution is to reestablish the usual common-law rules, realistically applied." *Id.*, at 2.

The causes of congressional dissatisfaction with the proposed regulation were twofold. As a fiscal matter, the Committee cited testimony that the new regulation would extend social security benefits to between 500,000 and 750,000 new workers, who had not been covered previously and had not contributed to the trust fund from which benefits would be paid, thus endangering the integrity of the fund. More generally, the Committee was fearful of the uncertainty that would be created by the new regulation, and the discretion it would give to the executive agencies in determining the applicability of the statutes. The Report stated:

> "In a word, by unbounded and shifting criteria, [the proposed regulation] would confer in those administering the Social Security Act full discretion to include, or to exclude, from the coverage of the act any person whom they might decide to be, or might decide not to be, an 'employee'; and like discretion to fasten tax liabilities and the administrative duties and costs of compliance with the act upon any person whom they might decide to be an 'employer.'
>
> "The proposed regulation discards the common-law rules for distinguishing the employer-employee relationship distilled from many decisions by many courts out of many insights of real situations, for a new rule of nebulous character.
>
> "Under the proposed regulation an 'employee' is 'an individual in a service relationship who is dependent as a matter of economic reality upon the

> business to which he renders service and not upon his own business as an independent contractor.'
>
> "The rule, obviously, will not serve to make the necessary distinctions. Who, in this whole world engaged in any sort of service relationship, is not dependent as a matter of economic reality on some other person? . . .
>
> . . . . . .
>
> ". . . [T]he proposed regulation concerns itself mainly, as was stated to your committee by a witness at the hearings: '. . . with making it abundantly clear that on virtually no state of facts may anyone be certain whether or not he has a tax liability until the Commissioner has made up his mind about it.'" *Id.*, at 7, 10, 11.

The Committee stated that, in contrast to the proposed regulation, whose "basic principle . . . is a dimensionless and amorphous abstraction," the existing regulation was "not devoid of uncertainty, but its basis is in established standards of law which frame and limit its application." *Id.*, at 12. The conclusions stated in the House Report were similar. H. R. Rep. No. 1319, 80th Cong., 2d Sess. (1948).[13] By the resolution, Con-

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[13] In a report published just two weeks before the enactment of the resolution (commenting on H. R. 6777, a bill that contained the same amendment ultimately accomplished by the resolution), the House Committee on Ways and Means stated:

"Our failure to act may be further construed as conferring upon the administrative agencies and the courts an unbridled license to say, at will, whether an individual is an employeee or an independent contractor . . . .

". . . [T]he basic controlling factor is whether the policy of the Congress shall be to cover as employees only those who are employees under the common-law rule, or to cover a broader class of individuals under some nebulous hypothesis with no bounds to its application." H. R. Rep. No. 2168, 80th Cong., 2d Sess., 9 (1948).